STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,048

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare denying his application for Medicaid benefits. The issue is whether the petitioner is disabled as that term is defined in the Medicaid regulations.

FINDINGS OF FACT

1. The petitioner is a forty-year-old man who has a high school diploma in special education courses. The petitioner claims that he is not able to either read or write well, in spite of his high school education. He was unable to begin school until he was eleven because of physical deformities and actually attended school for only seven years. Comments made by examiners and interviewers throughout the petitioner's three Medicaid application processes indicate that third parties had to read and fill out application forms for him and that he often had difficulty understanding questions. A psychologist recently hired by DDS to evaluate the petitioner commented that the petitioner was "uneducated" and the petitioner's resume shows that he took at least one "Adult Basic Education" course after leaving high school. In addition, the petitioner's credible statement to his physician was that he needs help with reading labels and signs when he goes shopping and cannot write a grocery list. Based on this information, it is concluded that the petitioner's education is "limited" rather than that usually considered commensurate with a high school level.

2. The petitioner's past relevant employment was as a dishwasher and preparation cook in the restaurant trade. Those positions required a considerable amount of moderate (50-100 pounds) lifting and constant repetitive reaching, as well as frequent overhead reaching. The petitioner last worked in this employment in September of 1990, when he was laid off due to the restaurant's closing.

3. The petitioner has several congenital medical problems: he has a full scale IQ in the 80-85 range which is classified as either "low normal" (on the high end of the range) or as "borderline

retardation" (on the low end of the range) (the petitioner had two IQ tests, on the first he scored 78 on the performance IQ, 83 on the verbal IQ and 80 overall; on the second, he scored, 79 on the verbal IQ, 94 on the performance IQ and 85 overall); he has color blindness and amblyopia which prevents him from focussing his eyes together; he has deformed "ring" and "index" fingers in both the left and right hands; a speech impediment; a low level hearing loss; and severe facial and nasal deformities for which he has undergone close to a dozen operations and which require at least three more operations for which the petitioner cannot pay. Subsequent to leaving high school, the petitioner received SSI benefits based on these problems. However, he voluntarily gave up the benefits because he thought he could work.

4. The petitioner has spent a good deal of effort compensating for his medical impairments in his work situations. However, the evidence still shows that the petitioner, due to these congenital problems, has difficulty understanding, remembering and carrying out detailed instructions; cannot climb or work at unprotected heights; cannot be subjected to cold or vibrations; cannot communicate well over the telephone; cannot drive or carry out tasks requiring acute vision; cannot hear well when there is background noise; and has limited ability to reach and finger due to a lack of fine motor control in his fingers. In his job as a dishwasher, the petitioner was able to compensate for these problems or did not have to use these skills.

5. In 1989, the petitioner fractured his shoulder as the result of a bicycle accident. Although he received immediate treatment for the trauma, he was not able to afford physical therapy needed to restore his range of motion. After his accident, he continued to work as a dishwasher for about a year, although the job became increasingly difficult for him due to pain and weakness in his right arm and hand. He was laid off of that job when the restaurant closed in the Fall of 1990. He thereafter received unemployment compensation for about a year and a half until May of 1992. He has not done any significant work activity since that time.

6. Because of his poverty, the petitioner has not been seen by a doctor or regularly treated for any of his impairments since at least 1989. According to consultants hired by DDS, the petitioner, in addition to his congenital impairments, currently suffers from "frozen shoulder syndrome" on his right side which restricts him from raising his arm above shoulder level or doing any repetitive reaching motions. His right arm and hand are weak due to this syndrome and possibly due to arthritis as well. The petitioner reported to one consulting physician as early as 1991 that he could not lift more than about five pounds with his right arm, and experienced regular pain whether he moved his arm or not.

7. Since being laid-off his last job, the petitioner has attempted several odd jobs , such as lawn mowing and cellar cleaning on a day to day basis. After doing such labor for a day, the petitioner finds he is stiff and in pain the next day and can only recover with at least a day of rest and aspirin therapy. He has attended Vocational Rehabilitation and seems genuinely motivated to work. The petitioner is still able to care for his home, tend his garden, and shop but finds that he must do so at a very slow pace using his right arm as little as possible and allowing for plenty of rest in between activities. He often needs assistance with heavier work such as lifting grocery bags.

Because of his eyes, he cannot drive and transports himself by walking, bicycling or getting rides with friends.

8. Based on the above, it is found that the petitioner's right arm impairments prevent him from lifting anything over five pounds on a regular basis.

9. Use of both hands has become increasingly painful for the petitioner. Though DDS has not authorized specific tests, the consultants suspect the pain is due to arthritis or to his congenital malformations. He has poor strength in his fingers and experiences pain when using them for any length of time. He is unable to fully flex his fingers or make a closed fist with his hands.

10. Because of his combination of impairments, particularly his inability to lift with his right arm, the petitioner cannot engage in the activities required by his former job as a dishwasher and preparation cook.(1)

RECOMMENDATION

The decision of the Department is reversed.

REASONS

Medicaid Manual Section M211.2 defines disability as follows:

Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exits in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work experience is considered.

The medical evidence clearly shows that the petitioner

is not able to do his former work because it required considerable lifting which the petitioner's "frozen arm syndrome" and hand pain clearly prevent. The question then arises whether the petitioner has the residual functional capacity to do other work.

The petitioner's residual functional capacity could, at best, be described as limited to sedentary work. Sedentary work is defined in the regulations as follows:

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is

often necessary in carrying out job duties. Jobs are

sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 416.967

Ordinarily, a person who can perform the full-range of sedentary work who is the petitioner's age (a "younger individual"), who is illiterate and has only unskilled work experience would not be disabled under the Medical-Vocational Guidelines (the "grid") used in determining residual abilities. See 20 C.F.R. § 404. Subpart P, Appendix 2, Rule 201.23. However, the petitioner cannot perform a full-range of sedentary work because he has substantial exertional and non-exertional impairments which severely restrict him in this area, namely his lack of fine motor skills, inability to reach and finger objects, low intellectual functioning and visual abnormalities. Because he cannot perform the full-range of activities, the "grid" cannot be used to find him ineligible. 20 C.F.R. § 404, Subpart P, Appendix 2, Rule 200(a).

In fact, decisional Rule 201.00(h) under the above cited regulation, dictates that a person with problems similar to the petitioner's be determined "disabled" under the Medical-Vocational guidelines:

However, a finding of disabled is not precluded for those individuals under age 45 who do not meet all of the criteria of a specific rule and who do not have the ability to perform a full range of sedentary work. The following examples are illustrative: Example 1: An individual under age 45 with a high school education can no longer do past work and is restricted to unskilled sedentary jobs because of a severe medically determinable cardiovascular impairment (which does not meet or equal the listings in Appendix 1). A permanent injury of the right hand limits the individual to sedentary jobs which do not require bilateral manual dexterity. None of the rules in Appendix 2 are applicable to this particular set of facts, because this individual cannot perform the full range of work defined as sedentary. Since the inability to perform jobs requiring bilateral manual dexterity significantly compromises the only range of work for which the individual is otherwise qualified (i.e. sedentary), a finding of disabled would be appropriate.

Like the individual in the above example, the petitioner is under age forty-five, restricted to sedentary work, and is not able to perform the full range of work defined as sedentary due, in part, to an inability to perform jobs requiring bilateral manual dexterity. In addition, unlike that individual, the petitioner possesses less than a high school education and has many other medical impairments which impinge upon his ability to perform the full range of sedentary work, making his case even more severe than that of the example. Therefore, Rule 201.00(h) would similarly dictate that the petitioner be found "disabled".

The petitioner appears to be "disabled" under a "severity" analysis as well. The "Listings of Impairments" found at 20 C.F.R. § 404, Subpart P, Appendix 1, dictate a finding of "disability" for persons with a valid verbal, performance, or full scale IQ of 60 to 69 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function." Rule 12.05 (C). The petitioner has one performance IQ score of 78, just a few points higher than that of the listing, and not only one, but several physical impairments imposing additional and significant work-related limitations of function. As such, it may be fairly said that the petitioner has a condition which is roughly equivalent to a listing mandating a finding of "disability" regardless of the petitioner's age, education, and work experience. See 20 C.F.R. § 416.920(d).

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1. The petitioner has applied for Medicaid three times since he lost his job in 1990. On the first two applications, DDS found that he could not return to his former employment but felt there were other jobs he could do. On the current application, although the petitioner certainly showed no improvement in his condition, DDS inexplicably determined that the petitioner could do his former job.